UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

ORVILLE J. BERG, Plaintiff, vs. JO ANNE B. BARNHART, COMMISSIONER OF SOCIAL SECURITY, Defendant.	No. C03-4064-MWB **REPORT AND RECOMMENDATION**

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I. INTRODUCTION

The plaintiff Orville J. Berg ("Berg") appeals a decision by an administrative law judge ("ALJ") denying his application for Title II disability insurance ("DI") benefits. Berg argues the record does not contain substantial evidence to support the ALJ's decision. (*See* Doc. Nos. 8 & 10)

II. PROCEDURAL AND FACTUAL BACKGROUND

A. Procedural Background

On February 8, 2000, Berg filed an application for DI benefits (R. 90-92), alleging a disability onset date of September 30, 1999. Berg alleged he was disabled due to asthma and allergies. (R. 102) The application was denied initially on April 27, 2000 (R. 43, 45-48), and on reconsideration on October 16, 2000 (R. 44, 51-55). On November 30, 2000, Berg requested a hearing (R. 56), and a hearing was held before ALJ Virgil Vail on June 22, 2001, in Spencer, Iowa. (R. 361-411) Berg was represented at the hearing by non-attorney Bryon Whiting. Berg testified at the hearing, as did Vocational Expert ("VE") Dr. William Tucker. In addition, Berg offered the testimony of five witnesses. (*See id.*)

On August 28, 2001, ALJ Vail ruled Berg was not entitled to benefits. (R. 263-76) On March 5, 2002, the Appeals Council of the Social Security Administration granted Berg's request for review, vacated ALJ Vail's decision, and remanded the case for a new hearing and consideration of further evidence. (R. 279-84)

ALJ Robert Maxwell held a new hearing on May 23, 2002, and conducted a *de novo* review of the evidence. (R. 412-56) Berg again was represented by non-attorney Bryon Whiting. Berg testified at the hearing, as did VE Dr. William Tucker. Berg did not recall his five witnesses, but asked that their testimony be made a part of the record of the second hearing. On October 17, 2002, ALJ Maxwell issued his opinion, finding Berg was not disabled and denying his application for benefits. (R. 16-34) On May 19, 2003, the Appeals Council denied Berg's request for review, making the ALJ's decision the final decision of the Commissioner. (R. 9-11)

Berg filed a timely Complaint in this court on July 14, 2003, seeking judicial review of the ALJ's ruling. (Doc. No. 1) In accordance with Administrative Order #1447, dated September 20, 1999, this matter was referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B), for the filing of a report and recommended disposition of Berg's claim. Berg filed a brief supporting his claim on October 27, 2003. (Doc. No. 8) The Commissioner filed a responsive brief on December 10, 2003. (Doc. No. 9) Berg filed a reply brief on December 19, 2003. (Doc. No. 10) The matter is now fully submitted, and pursuant to 42 U.S.C. § 405(g), the court turns to a review of Berg's claim for benefits.

B. Factual Background

1. Introductory facts and Berg's daily activities

At the time of the hearing,[1] Berg was three weeks short of his 57th birthday. He was 6'4" tall and weighed 240 pounds, which he stated was a very stable weight for him.

[1]References in this opinion to "the hearing" refer to the second ALJ hearing on May 23, 2002.

He lived alone, his wife having been killed in a car accident on August 14, 2000. The couple had no children. (R. 420)

Berg graduated from Iowa State University with a degree in Animal Science. He also received a teaching certificate, and he taught Vocational Education early in his working career. He served in the Army from January 1968 through October 1969, during which time he was an infantry sergeant in Vietnam, and he received an honorable discharge upon returning from Vietnam. (R. 421-22)

Berg stated he last worked in September 1999, when he worked part-time as a courier. He was making deliveries for Bank Midwest, and, according to Berg, the bank was increasing his route to include businesses such as beauty salons and a remodeling business that used varnish. He stated he could not tolerate the odors, so he quit working as a courier and had someone else take over the business. (R. 422, 424)

Berg worked as a court-appointed receiver for a bankruptcy case during 2001. He worked as a real estate broker until October or November of 2001, but turned in his broker's license in December 2001, after receiving his final check. Neither of these jobs rose to the level of substantial gainful activity. (*See* R. 33, ¶ 2, ALJ's finding that Berg had not engaged in substantial gainful activity since his alleged disability onset date) He stated he last worked as a real estate broker for the public (as opposed to working in a court-appointed capacity) five or six years prior to the hearing. (R. 423) He explained his wife had been "a very well paid executive," and he was "living off of her retirement and her life insurance," as well as some other assets. (R. 424)

Berg does not think he could return to the courier job because of his breathing problems. He similarly does not believe he could return to work as a real estate agent because he would have to transport people in his car and they might be wearing too much

perfume, or he would have to go into houses with a musty basement or potpourri or other odors. (R. 424-25)

Berg stated he has been unable to work full time since September 1999, due to his breathing problems. He described his condition as follows:

> I take Albuterol every day. Well, there's a list there of the medicine. But I take the Albuterol and on an average day today, for like today I took it at about a quarter to eleven. That usually holds me real well. I can go out and do things for a period of four hours. And then it starts to wear off. And for me to go, you know, if I can go to an office or to a commissioner's meeting and be there for an hour or so I'm just fine. But when it drags on more than that.[. . .] And the problem with taking, I can continue to take the medicine, but then I can't sleep. I shake so bad I cannot write. I get to the point I can't write my own checks. I can't, you know, I have to give the gal in the grocery store my checkbook to write my check. And if I do that for more than a day or so where I take enough Albuterol to keep going all day then I virtually don't sleep at all. And I get in such a state that I just can't function.

(R. 425) Berg stated his condition varies dramatically from day to day, week to week, and seasonally. (R. 425-26)

According to Berg, he was diagnosed with asthma at the Mayo Clinic in the late 1970s. (R. 426) He stated doctors at the clinic ran some type of test to see if they could provoke asthmatic symptoms and his "reaction was so violent that the little gal doing the test hit the big red button and everybody came running." (R. 429) He stated they started running allergy testing but he "was allergic to so much stuff they just gave up" because "there was no point in continuing." (*Id.*) According to Berg, no other doctor has run allergy tests or suggested further testing. (*Id.*)

Currently, his treatment is managed by doctors at the Veterans Administration in Sioux Falls, most recently a Dr. Looby. (R. 426-27) Berg stated his medications had remained basically the same for two or three years. He stated the doctors always give him five or six renewals of his prescriptions so he will have his steroids, antibiotics, and antifungals on hand, and he will not have to go see the doctor when his condition flares up. He stated, "[T]hey figure after I've been at it for 20 years they just let me take care of it myself." (R. 427) He also has a nebulizer at home which he uses as needed. (R. 428)

Berg's pulmonologist of record is Dr. Al Shami with University Physicians in Sioux Falls, who acts as consulting physician for the VA. Although Berg's last pulmonary function test was in the fall of 2001, he has not actually seen Dr. Shami in two or three years. The doctor reviews the test results from the VA, and according to Berg, "his name still shows up on the record." (R. 428) Berg stated his condition is about the same now as it was in August 2000. He stated his doctors have told him to avoid doing things that cause his asthma to flare up. (R. 429-30) He does not smoke or keep household pets, and he avoids going to places where pets are present. (R. 430)

Berg stated his asthma has turned him into a hermit, causing him to "hide at home a lot." (R. 431) He stated his house is his "only refuge," where he can escape things that trigger his asthma. He has no drapes, carpets, or upholstered furniture. He has "one big green leather chair" and wooden furniture, and he stated "everything else is just hard wood and empty rooms really." (*Id.*) He does not allow guests to stay in his house, and when family members come to visit, they stay in a motel. (R. 432)

Berg testified he takes the following medications on a daily basis: Accolate for asthma, 20 mg. twice/day; Lisinopril for high blood pressure, 5 mg./day; Levothyroxine for low thyroid, .075 mg./day; Amitriptyline HCL for acid stomach, 25 mg./day; Lansoprazole for acid stomach, 30 mg./day; Azmacort for asthma, 6 puffs twice/day.

(R. 431, 153) In addition, he takes the following medications on an as-needed basis for his asthma: Albuterol Inhaler for asthma, 2 puffs at a time, and Albuterol Solution .083%. (*Id.*) He also takes a multi-vitamin and mineral supplement, Ester-C, and Psyllium husks for "constant constipation." (R. 153) He stated he was last on a course of Prednisone in September and October 2001, for "an extended period." (R. 431)

In addition to his asthma, Berg stated he has "some shoulder problems" that affect him when he drives for long periods, and he gets periodic cortisone shots in his shoulder. However, his shoulder problems and hypothyroidism do not affect his ability to work. (R. 432-33)

Berg stated he is able to care for himself and do his own household chores, except that his sister cleans the bathroom for him because he has been unable to find a perfume-free cleaning product for the bathroom. He does his own cooking, laundry, and grocery shopping, although he stated he has a problem with grocery stores that have floral displays in them. He has a central vacuum system and does his own vacuuming. (R. 433-34) He attends Rotary meetings once a week, but sometimes he has to leave early if the ladies in attendance are wearing perfume. He is the Soil Commissioner on the City Council, which requires a one-hour meeting each month and occasional additional meetings. He stated he has been a Soil Commissioner continuously since the late 1970s, and he is "quite active." (R. 435) According to Berg, the council members are accommodating and if he has a problem at a meeting's location, they will adjourn to a different location, or he will just leave the meeting. (R. 435-36) He stated much of his work as Soil Commissioner is done by e-mail, phone calls, and conference calls. He stated he is Chairman of the Clean Water Alliance, which meets four times a year and "entails a lot of communication with a variety of people." (R. 436) Berg estimated all of his volunteer interests take up about one to two hours per day, the greatest part of which is done from his home. (*Id.*)

Berg stated his only remaining hobby is riding his jet ski, which he does several times a week. He used to play racquetball and golf, and scuba dive, but he has not been able to participate in those activities in the last fifteen or twenty years. He stated he exercises regularly, but the only place he can exercise is at home because there are too many things that bother him elsewhere. Sometimes he works in his yard, wearing a mask. (R. 436-38) He stated he has a good appetite. His sleep will vary greatly depending on how much Albuterol he has taken. (R. 437)

Berg feels able to do the full range of activities such as walking, sitting, standing, lifting, carrying, and the like, as long as he can control his environment. He drives a car, but the only time he fills his own gas tank is when he cannot find a station that will fill it for him. (R. 437-38) He is able to travel, and took a two-month trip to California during the winter of 2001-02. He stated he stayed right on the beach and was careful about when he went outdoors, noting that if the air was coming in off the ocean, he would be fine and could go out and walk, ride a bike, and do other activities. If the wind was not coming off the ocean, he would stay inside. (R. 439)

Berg gave the following rationale to explain why he is able to care for himself and his home, and engage actively in volunteer work, but would be unable to work:

> As a volunteer and the people that I work with in the volunteer work, understand and are accepting of the problems that I have, my breathing problems. And when I say I need to leave, they are very accommodating. They know when they ask me to be at a meeting that they will plan it at a place that works well for me. We have a lot of meetings down at the Arnold Park City Hall. It's a nice clean place that I get along very well in. They move meetings from one place to another to accommodate me. And then I pla[n] my day around those meetings. I plan my visit to my mother in the nursing home either before or after the meeting. I normally eat out one meal

> a day. And so I plan that meal based on what meeting I'm going to go to that day so I'm either eating on the way or on the way home. That way I limit my time away from my house to that three, with a maximum of four hours.

(R. 440-41)

2. Berg's medical history

A detailed summary of the medical records entered into evidence in this case is being filed separately under seal as Appendix A to this opinion. The record indicates Berg has had problems with allergies and asthma since at least the mid 1970s. He underwent evaluation at the Mayo Clinic in July 1991. In a report from the evaluation dated July 8, 1991, Mark E. Bubak, M.D. noted Berg's "chest was clear and peak flows were normal at 500 L/minute." (R. 171) His pulmonary function was mildly decreased in FEV1[2] at 69%, increasing to 84% after the administration of isoproterenol. "The residual volume was increased to 152% predicted, with a normal DLco[3] and oxygen saturation." (*Id.*) Dr. Bubak noted Berg's asthma "is mainly flared by exposure to irritants." (R. 172) The Mayo doctors recommended he take Azmacort and Proventil, and have follow-up testing

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[2]FEV1 stands for "forced expiratory volume in one second," and FVC stands for "forced vital capacity." These terms are used in reporting the results from spirometry, a pulmonary function test that measures the rate of airflow during maximal expiratory effort after maximal inhalation. The test is "useful in differentiating between obstructive and restrictive lung disorders." Patients with asthma (an obstructive lung disorder) usually will exhibit a decreased FEV1, normal FVC, and decreased ratio FEV1/FVC. In restrictive disorders, the FEV1 and FVC usually both are decreased, leaving a normal ratio of FEV1/FVC. http://meded.ucsd.edu/isp/1998/asthma/html/spirexp.html (04/12/04).

[3]DLco stands for "diffusing capacity for carbon monoxide," and "provides an objective measurement of lung function. It is defined as the lung's ability to take up an inhaled nonreactive test gas, such as carbon monoxide (CO), which binds to hemoglobin." http://www.bcbst.com/MPManual/Carbon_Monoxide_Diffusing_Capacity_(DLco).htm (04/12/04).

in three months. In addition, the Mayo doctors recommended Berg, who was 6'3" tall and weighed 260 pounds, lose weight and exercise regularly. (R. 171)

Since the 1991 evaluation, Berg has been seen regularly by S.C. Carlson, D.O. for ongoing treatment of his allergies and asthma, and related problems. He has had frequent sore throats, coughs, colds, congestion, wheezing, sinus pressure, earaches, vertigo, and poison ivy and other rashes. He has been treated with a variety of antibiotics, asthma and allergy medications, antihypertensive medications, and oral and inhaled steroids. His medications have caused numerous side effects, including uncomfortable yeast infections from prolonged use of antibiotics, occasional nausea, weakness, tremors, sleep and appetite difficulties, heart palpitations, and intermittent headaches. In the spring of 1997, he also began experiencing chronic abdominal pain that did not resolve despite removal of his gallbladder.

In a letter to DDS dated February 23, 2000, Berg's long-time treating physician, Dr. Carlson, opined Berg should avoid excessive lifting and carrying, which could exacerbate his asthma. He can stand, walk, and sit without limitation, and has no problems seeing, hearing, and speaking. He should avoid "excessive amounts" of stooping, climbing, kneeling, and crawling, and should "avoid work environments which contain dust and fumes as these would exacerbate his asthma and his allergies." (R. 225)

These conclusions are largely consistent with the Physical Residual Functional Capacity Assessment conducted by Gary J. Cromer, M.D. on April 26, 2000. From his review of the records, Dr. Cromer opined Berg could lift/carry thirty pounds occasionally and fifteen pounds frequently; push or pull without other limitations; stand/walk and sit for a total of six hours (for each activity) in an eight-hour day; and frequently climb ramps, stairs, ladders, ropes, or scaffolds, and balance, stoop, kneel, crouch, and crawl. Dr. Cromer also found Berg should avoid even moderate exposure to extreme cold, fumes,

odors, dusts, gases, and poor ventilation. (R. 162-70) Dr. Cromer reviewed Dr. Carlson's statement, but found it "too vague to compare with the RFC restrictions." (R. 170) Dr. Cromer reached the following conclusions regarding Berg's RFC:

> Claimant has documented medically determinable impairments with asthma and mild obesity. In view of his past spirometries showing nonsevere decreases in FEV1 and FVC, the lack of documented chronic asthmatic bronchitis, and in the absence of tobacco smoking that could worsen his pulmonary disease, no further pulmonary function testing is necessary to assess severeity [sic]. His impairments are severe but don't meet or equal reference Listing 3.03. His subjective statements are consistent with the other evidence in file, and claimant is generally considered credible. His [activities of daily living] are noted to remain relatively intact. The RFC limitations are based on the relatively well controlled asthma occasionally requiring use of prednisone, and considerable function reflected in claimant's report of [activities of daily living].

(*Id.*)

3. Vocational expert's testimony

VE William B. Tucker was the VE at Berg's first and second hearings. He prepared a summary of Berg's work history that lists real estate agent and courier as Berg's past jobs. He stated Berg would have "transferable skills from his abilities clerically and in communication that would transfer to other [light or sedentary] occupations." (R. 447) He would have no transferable skills from the unskilled courier job. (*Id.*)

The ALJ asked the VE to consider an individual 56 years of age, with a Bachelor's Degree, but whose degree was not specifically utilized in a job setting for the prior fifteen years. The individual previously was licensed as a real state broker, and has Berg's past

work history. (R. 447-48) The individual has "the degree of intolerance to environmental irritants described by Mr. Berg in his testimony." (R. 448) Considering those factors, the VE testified the individual could not return to his past work as a real estate broker or a courier, nor could he perform any other type of work on a full-time basis. (*Id.*) Assuming Berg's testimony to be accurate, the VE stated the hypothetical individual would be unable to sustain activity for more than four or five hours without being heavily medicated by medications that cause "big time side effects." (*Id.*) The VE's conclusion would not change if the hypothetical individual were between 54 and 55 years of age, instead of over 55. (R. 448-49)

The ALJ then asked a second hypothetical question, as follows:

> I want you to assume the individual is, has the same age, education and work experience as [Berg]. What if a person could occasionally lift or carry 30 pounds, frequently 15 pounds. Could stand or walk or sit with normal breaks for about six hours of an eight hour day. Push/pull activities are unlimited. Postural activities are frequent, no manipulative, visual or communicative limits. From an environmental standpoint, what if a person needed to avoid even moderate exposures to extremes of cold and fumes, odors, dusts, gases, poor ventilations. In all other respects the individual is unlimited from an environmental standpoint. What is the effect here on work as a, in real estate or as a courier?

(R. 449) The VE responded that the real estate and courier jobs are performed both indoors and outdoors, and thus both jobs would prevent the individual from completely controlling the temperature and the environmental contaminants. The individual therefore could not return to either of those jobs. (*Id.*)

The VE noted the individual's past jobs would allow for transfer of skills to an office environment or other "fairly clean and controlled environment." (R. 450)

Transferable skills from the real estate job include clerical skills and good communication skills. (R. 451) The VE opined those skills should be transferable to such jobs as telephone sales representative, credit card clerk, and appointment clerk, all of which are semi-skilled jobs. (R. 450, 452) Again, however, if Berg's testimony were taken as credible, then with the sensitivities he described, the individual would not be able to perform these jobs because the person would not be able to control perfumes and other irritants that might be brought into the environment by members of the public. (R. 451)

Whether the individual would be able to perform the listed jobs would depend on the level of dust and fumes in the workplace, which the VE noted cannot totally be eradicated. In general, a clerical office is considered not to have dust and fumes, and to be temperature and fresh air controlled. (R. 452) The VE noted that if irritants were brought into the environment that caused the individual to have to leave the work station, and this occurred with any kind of regularity, the individual likely would lose the job. (R. 454)

The ALJ explained to Berg that the record is clear regarding his contention that he is unable to work in any environment for eights hours a day, five days a week. If Berg's testimony is accepted as credible, "nobody would say that there's any job [he] can do." (R. 455) However, "[t]he rub is whether or not that is medically corroborated and found to be credible . . . [a]fter consideration of the testimony and the medical records and updating of the medical records[.]" (*Id.*)

In response, Berg asked the ALJ to note the amounts and frequency of medications he has used and that are prescribed for him. He noted that after dealing with his problems for over twenty years, he does not require frequent doctor and emergency room visits. Instead, he maintains "a working relationship" with his doctors, and he treats his problems himself, with medications. (*Id.*)

d. The ALJ's decision

The ALJ found Berg had not engaged in substantial gainful activity since his alleged disability onset date of September 30, 1999. He further found Berg's asthma is a severe impairment that does not meet or equal a listed impairment.[4] (R. 33) In so holding, the ALJ compared the results of Berg's spirometry testing and his clinical treatment to the Listing requirements for disabling asthma, as set forth in 20 C.F.R. Part 404, Subpart P, Appendix 1, section 3.03. He found the pulmonary function testing did not show levels that are deemed disabling under the regulations. (R. 21-23) He further noted doctors' notes indicate Berg's asthma is controlled by medication, with occasional exacerbations that also are treated with medications. He noted Berg has not been hospitalized or sought emergency room assistance since his alleged onset date, and he has not sought a physician's intervention with regard to periodic flares of his asthma. Berg testified he handles flares himself, and his condition has remained essentially the same since 2000. (R. 22-23, 26)

At the close of the hearing, the ALJ identified the primary issue in the case as whether Berg's subjective complaints regarding the level, severity, and frequency of his symptoms are credible. If they are, then the VE testified he likely would be unable to maintain employment due to his inability to control environmental factors. If they are not, then Berg's level of daily activities, background and experience, and transferable skills indicate he would be able to work in a number of clerical capacities.

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[4]The ALJ also briefly discussed Berg's obesity and shoulder pain, finding neither of those impairments significantly impacts Berg's ability to perform work-related activities. (R. 21) The court notes Berg alleged disability solely on the basis of his asthma and allergies, and as the ALJ notes, Berg did not testify to any significant problems related to his shoulder or obesity. (*See id.*; R. 102)

The ALJ found Berg's subjective complaints to be inconsistent with the objective medical evidence. The ALJ expounded upon his reasons for this finding in some detail, including the following:

> The medical record does not document emergency room treatment or hospitalizations during exacerbations or flares of the claimant's underlying reactive airways disease which could reasonably be expected if his symptoms are as severe and frequent as he described and pulmonary function tests have documented mild decrease in FEV1, mild reduction in mid flows with improvement with bronchodilators, and/or borderline abnormal obstructive defect. Further, the claimant's asthma has repeatedly been described as under fair to good control or controlled, with the only exception being in September 2001 during the only documented flare or exacerbation. He has otherwise had a history of unremarkable medical follow up for his reactive airways disease.
>
> The claimant alleges disability onset as of September 1999. However, in 1999 he essentially had one flare of his disease that required medical attention in February (1999). After that date he was seen in June 1999 at which time he planned a trip to Indiana and requested an antibiotic and Prednisone to take with him; in September 1999 (proximate to his alleged onset), he had no cold or shortness of breath, and his lungs were clear; and in February 2000 he planned to leave on vacation and once again requested medications in the event he had a flare of symptoms.
>
> The above suggests that the claimant's asthma was controlled proximate to his alleged onset date and his need to request medications is contrary to his testimony that he has had antibiotics and Prednisone "on hand" for flares so that he could take them as needed. Further, these reported travels to Indiana and on vacation are directly contrary to the claimant's contention that he is essentially confined to his home for other

> than 3 to 4 hours every day and that he does not otherwise venture into uncontrolled environments.

(R. 27)

The ALJ found no evidence in the record to support Berg's claim that allergy testing was discontinued at the Mayo Clinic because "he was allergic to so much, they just gave up and said there was no point in continuing." (*Id.*) However, in his brief, Berg points out he testified the allergy testing in question was performed in the 1970s, not during the 1991 evaluation referenced by the ALJ, and the ALJ did not have the records from the Mayo Clinic to substantiate Berg's testimony. (*See* Doc. No. 8, p. 13)

The ALJ found Berg's failure to seek frequent medical attention to be significant. He noted the record contains only one entry where Berg's asthma was described as "uncontrolled," and even at that time, the V.A. physician's assistant did not observe Berg's symptoms to be so severe that he would have been rendered nonfunctional for a period of two months. (R. 28) The ALJ noted Berg had reported using Prednisone approximately twice yearly, suggesting only two "significant flares on a yearly basis." (*Id.*) In addition, despite Berg's testimony that using Albuterol more than once a day resulted in significant side effects, the ALJ found "the medical record does not reflect that such has ever been reported to a medical professional or has such been observed in a clinical setting." (*Id.*)

The ALJ also found Berg's daily activities to be inconsistent with his description of the level, severity, and frequency of his symptoms, noting the following:

> In spite of his alleged environmental restrictions he has continued to engage in a full range of daily activities, he leaves his home on a daily basis, he eats out on a daily basis, he jet skis several times a week, he has visited relatives in Indiana and gone on vacation, and he is very active in community affairs. The claimant has, by his own description, daily

> exposure to the environment of a public café, and frequent exposure to the environment of a nursing home and public buildings which would necessarily expose him to some of the irritants listed [by Berg; *see* R. 159] and he leaves his home area for visits and vacation. Such exposures have not caused the need for medical intervention or adjustment in treatment.

(R. 28-29)

The ALJ considered the statements of non-medical witnesses regarding Berg's limitations, and the opinions of the State Agency consultants. He found the evidence does not support Berg's claim that he is "unable to engage in any work activity, but rather [the statements] outline environment restrictions that are recognized restrictions based on [Berg's] diagnosed reactive airways disease. The statements are not as restrictive or limiting as [Berg] alleges or describes in his statements and testimony and do not suggest environmental limitations that would preclude all work activity." (R. 31) The ALJ further noted the statements of the third parties were based on Berg's "presentation of symptoms and irritants the severity and frequency of which is not medically supported." (R. 33)

The ALJ adopted the RFC determination of the State Agency medical consultants, as follows:

> The claimant is capable of lifting/carrying 15 pounds frequently and 30 pounds occasionally; push/pull activities are unlimited; postural activities are all frequent; there are no manipulative, communicative, or visual limitations; but from an environmental standpoint he should avoid even moderate exposure to extremes of cold, fumes, odors, dusts, gases, and poor ventilation.

(R. 33; *see* R. 31) The ALJ found work activity within these guidelines is not contraindicated, and although Berg is unable to return to any of his past work, the above RFC would allow him to perform a significant range of light work, including such jobs as

telephone sales representative, credit card clerk, and appointment clerk. (R. 31-32, 34)

As a result of these findings, the ALJ concluded Berg was not disabled. (R. 34)

III. DISABILITY DETERMINATIONS, THE BURDEN OF PROOF, AND THE SUBSTANTIAL EVIDENCE STANDARD

A. Disability Determinations and the Burden of Proof

Section 423(d) of the Social Security Act defines a disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 404.1505. A claimant has a disability when the claimant is "not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists . . . in significant numbers either in the region where such individual lives or in several regions of the country." 42 U.S.C. § 432(d)(2)(A).

To determine whether a claimant has a disability within the meaning of the Social Security Act, the Commissioner follows a five-step sequential evaluation process outlined in the regulations. 20 C.F.R. §§ 404.1520 & 416.920; *Dixon v. Barnhart*, 353 F.3d 602, 605 (8th Cir. 2003); *Kelley v. Callahan*, 133 F.3d 583, 587-88 (8th Cir. 1998) (citing *Ingram v. Chater*, 107 F.3d 598, 600 (8th Cir. 1997)). First, the Commissioner will consider a claimant's work activity. If the claimant is engaged in substantial gainful activity, then the claimant is not disabled. 20 C.F.R. § 404.1520(4)(i).

Second, if the claimant is not engaged in substantial gainful activity, the Commissioner looks to see "whether the claimant has a severe impairment that significantly limits the claimant's physical or mental ability to perform basic work activities." *Dixon*, 353

F.3d at 605; *accord Lewis v. Barnhart*, 353 F.3d 642, 645 (8th Cir. 2003). The United States Supreme Court has explained:

> The ability to do basic work activities is defined as "the abilities and aptitudes necessary to do most jobs." . . . Such abilities and aptitudes include "[p]hysical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling"; "[c]apacities for seeing, hearing, and speaking"; "[u]nderstanding, carrying out and remembering simple instructions"; "[u]se of judgment"; "[r]esponding appropriately to supervision, co-workers, and usual work situations"; and "[d]ealing with changes in a routine work setting."

Bowen v. Yuckert, 482 U.S. 137, 140-42, 107 S. Ct. 2287, 2291, 96 L. Ed. 2d 119 (1987) (citing 20 C.F.R. §§ 404.1521(b), 416.921(b)).

Third, if the claimant has a severe impairment, then the Commissioner will consider the medical severity of the impairment. If the impairment meets or equals one of the presumptively disabling impairments listed in the regulations, then the claimant is considered disabled, regardless of age, education, or work experience. 20 C.F.R. § 404.1520; *Kelley*, 133 F.3d at 588.

Fourth, if the claimant's impairment is severe, but it does not meet or equal one of the presumptively disabling impairments, then the Commissioner will assess the claimant's residual functional capacity ("RFC") to determine the claimant's "ability to meet the physical, mental, sensory, and other requirements" of the claimant's past relevant work. 20 C.F.R. §§ 404.1520(4)(iv); 404.1545(4); *see Lewis*, 353 F.3d at 645-46 ("RFC is a medical question defined wholly in terms of the claimant's physical ability to perform exertional tasks or, in other words, 'what the claimant can still do' despite his or her physical or mental limitations.") (citing *Bradshaw v. Heckler*, 810 F.2d 786, 790 (8th Cir. 1987); 20 C.F.R. § 404.1520(e) (1986)); *Dixon*, *supra*. The claimant is responsible for

providing evidence the Commissioner will use to make a finding as to the claimant's RFC, but the Commissioner is responsible for developing the claimant's "complete medical history, including arranging for a consultative examination(s) if necessary, and making every reasonable effort to help [the claimant] get medical reports from [the claimant's] own medical sources." 20 C.F.R. § 404.1545(3). The Commissioner also will consider certain non-medical evidence and other evidence listed in the regulations. *See id.* If a claimant retains the RFC to perform past relevant work, then the claimant is not disabled. 20 C.F.R. § 404.1520(4)(iv).

Fifth, if the claimant's RFC as determined in step four will not allow the claimant to perform past relevant work, then the burden shifts to the Commissioner "to prove that there is other work that [the claimant] can do, given [the claimant's] RFC [as determined at step four], age, education, and work experience." Clarification of Rules Involving Residual Functional Capacity Assessments, etc., 68 Fed. Reg. 51,153, 51,155 (Aug. 26, 2003). The Commissioner must prove not only that the claimant's RFC will allow the claimant to make an adjustment to other work, but also that the other work exists in significant numbers in the national economy. *Id.*; 20 C.F.R. § 404.1520(4)(v); *Dixon, supra*; *Pearsall v. Massanari*, 274 F.3d 1211, 1217 (8th Cir. 2001) ("[I]f the claimant cannot perform the past work, the burden then shifts to the Commissioner to prove that there are other jobs in the national economy that the claimant can perform.") (citing *Cox v. Apfel*, 160 F.3d 1203, 1206 (8th Cir. 1998)); *Nevland v. Apfel*, 204 F.3d 853, 857 (8th Cir. 2000). If the claimant can make an adjustment to other work that exists in significant numbers in the national economy, then the Commissioner will find the claimant is not disabled. If the claimant cannot make an adjustment to other work, then the Commissioner will find the claimant is disabled. 20 C.F.R. § 404.1520(r)(v).

B. The Substantial Evidence Standard

Governing precedent in the Eighth Circuit requires this court to affirm the ALJ's findings if they are supported by substantial evidence in the record as a whole. *Krogmeier v. Barnhart*, 294 F.3d 1019, 1022 (8th Cir. 2002) (citing *Prosch v. Apfel*, 201 F.3d 1010, 1012 (8th Cir. 2000)); *Weiler, supra,* 179 F.3d at 1109 (citing *Pierce v. Apfel*, 173 F.3d 704, 706 (8th Cir. 1999)); *Kelley, supra,* 133 F.3d at 587 (citing *Matthews v. Bowen*, 879 F.2d 422, 423-24 (8th Cir. 1989)); 42 U.S.C. § 405(g) ("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive. . . ."). Under this standard, "[s]ubstantial evidence is less than a preponderance but is enough that a reasonable mind would find it adequate to support the Commissioner's conclusion." *Krogmeier, id.*; *Weiler, id.*; *accord Gowell v. Apfel*, 242 F.3d 793, 796 (8th Cir. 2001) (citing *Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000)); *Hutton v. Apfel*, 175 F.3d 651, 654 (8th Cir. 1999); *Woolf v. Shalala*, 3 F.3d 1210, 1213 (8th Cir. 1993).

Moreover, substantial evidence "on the record as a whole" requires consideration of the record in its entirety, taking into account both "evidence that detracts from the Commissioner's decision as well as evidence that supports it." *Krogmeier,* 294 F.3d at 1022 (citing *Craig*, 212 F.3d at 436); *Willcuts v. Apfel*, 143 F.3d 1134, 1136 (8th Cir. 1998) (quoting *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488, 71 S. Ct. 456, 464, 95 L. Ed. 456 (1951)); *Gowell*, 242 F.3d at 796*; Hutton*, 175 F.3d at 654 (citing *Woolf*, 3 F.3d at 1213); *Kelley*, 133 F.3d at 587 (citing *Cline v. Sullivan*, 939 F.2d 560, 564 (8th Cir. 1991)). The court must "search the record for evidence contradicting the [Commissioner's] decision and give that evidence appropriate weight when determining whether the overall evidence in support is substantial." *Baldwin v. Barnhart*, 349 F.3d 549, 555 (8th Cir. 2003) (also citing *Cline*, *supra*).

In evaluating the evidence in an appeal of a denial of benefits, the court must apply a balancing test to assess any contradictory evidence. *Sobania v. Secretary of Health & Human Serv.*, 879 F.2d 441, 444 (8th Cir. 1989) (citing *Steadman v. S.E.C.*, 450 U.S. 91, 99, 101 S. Ct. 999, 1006, 67 L. Ed. 2d 69 (1981)). The court, however, does not "reweigh the evidence presented to the ALJ," *Baldwin*, 349 F.3d at 555 (citing *Bates v. Chater*, 54 F.3d 529, 532 (8th Cir. 1995)), or "review the factual record *de novo*." *Roe v. Chater*, 92 F.3d 672, 675 (8th Cir. 1996) (citing *Naber v. Shalala*, 22 F.3d 186, 188 (8th Cir. 1994)). Instead, if, after reviewing the evidence, the court finds it "possible to draw two inconsistent positions from the evidence and one of those positions represents the agency's findings, [the court] must affirm the [Commissioner's] decision." *Id.* (quoting *Robinson v. Sullivan*, 956 F.2d 836, 838 (8th Cir. 1992), and citing *Cruse v. Bowen*, 867 F.2d 1183, 1184 (8th Cir. 1989)); *accord Baldwin*, 349 F.3d at 555. This is true even in cases where the court "might have weighed the evidence differently." *Culbertson v. Shalala*, 30 F.3d 934, 939 (8th Cir. 1994) (citing *Browning v. Sullivan*, 958 F.2d 817, 822 (8th Cir. 1992)); *accord Krogmeier,* 294 F.3d at 1022 (citing *Woolf*, 3 F.3d at 1213). The court may not reverse the Commissioner's decision "merely because substantial evidence would have supported an opposite decision." *Baldwin*, 349 F.3d at 555 (citing *Grebenick v. Chater*, 121 F.3d 1193, 1198 (8th Cir. 1997); *see Pearsall,* 274 F.3d at 1217; *Gowell*; 242 F.3d at 796; *Spradling v. Chater*, 126 F.3d 1072, 1074 (8th Cir. 1997).

On the issue of an ALJ's determination that a claimant's subjective complaints lack credibility, the Sixth and Seventh Circuits have held an ALJ's credibility determinations are entitled to considerable weight. *See, e.g., Young v. Secretary of H.H.S.,* 957 F.2d 386, 392 (7th Cir. 1992) (citing *Cheshier v. Bowen,* 831 F.2d 687, 690 (7th Cir. 1987)); *Gooch v. Secretary of H.H.S.,* 833 F.2d 589, 592 (6th Cir. 1987), *cert. denied*, 484 U.S. 1075, 108 S. Ct. 1050, 98 L. Ed. 2d. 1012 (1988); *Hardaway v. Secretary of H.H.S.,* 823

F.2d 922, 928 (6th Cir. 1987). Nonetheless, in the Eighth Circuit, an ALJ may not discredit a claimant's subjective allegations of pain, discomfort or other disabling limitations simply because there is a lack of objective evidence; instead, the ALJ may only discredit subjective complaints if they are inconsistent with the record as a whole. *See Hinchey v. Shalala,* 29 F.3d 428, 432 (8th Cir. 1994); *see also Bishop v. Sullivan,* 900 F.2d 1259, 1262 (8th Cir. 1990) (citing *Polaski v. Heckler,* 739 F.2d 1320, 1322 (8th Cir. 1984)). As the court explained in *Polaski v. Heckler:*

> The adjudicator must give full consideration to all of the evidence presented relating to subjective complaints, including the claimant's prior work record, and observations by third parties and treating and examining physicians relating to such matters as:
>
> 1) the claimant's daily activities;
> 2) the duration, frequency and intensity of the pain;
> 3) precipitating and aggravating factors;
> 4) dosage, effectiveness and side effects of medication;
> 5) functional restrictions.

Polaski, 739 F.2d 1320, 1322 (8th Cir. 1984). *Accord Ramirez v. Barnhart*, 292 F.3d 576, 580-81 (8th Cir. 2002).

IV. ANALYSIS

This case places the court in a quandary. There is no question that Berg suffers from severe, disabling asthma. There also is no question that Berg has learned to control and live with his disability, and to live a fairly normal and active lifestyle, without regular intervention by the medical care establishment. From this, the ALJ concludes Berg can perform a number of jobs in the economy. Berg responds that even though he has learned

to control his disability by taking appropriate medication when needed and controlling his environment, he nevertheless is unable to hold a full-time job.

Berg agrees with the ALJ's analysis of the first four steps of the sequential evaluation process, but disagrees with the ALJ's determination, at step five, that Berg is able to perform other work that exists in significant numbers and that accommodates his RFC. Berg argues the ALJ erred in failing to develop the record properly, in finding his subjective complaints lacked credibility, and in posing an "ineffective" hypothetical question to the VE. (Doc. Nos. 8 & 10) The Commissioner argues the record contains substantial evidence to support the ALJ's decision. (Doc. No. 9) The court will examine each of Berg's assertions of error.

A. Duty to Develop the Record

Berg argues the basic issue in this case is the extent to which his environmental limitations impact upon his ability to sustain employment. (*See* Doc. No. 8, pp. 12-15) He notes the ALJ discredited his listing of the irritants that exacerbate his asthma and prevent him from working because the ALJ found insufficient medical evidence "to corroborate them as being environmentally significant." (*Id.*, pp. 12-13) He argues the ALJ has the "burden of proof" at step five of the sequential evaluation process, and therefore he claims, "If the ALJ wants to discredit the environmental restrictions, the ALJ must provide proof contrary to what is in the record. If the ALJ intends to make a finding discrediting the proof that is in the file he has a duty to conduct an appropriate inquiry." (*Id.*, p. 13) Berg suggests the ALJ should have, for example, subpoenaed his treating physician, propounded interrogatories to his treating physician seeking elaboration and clarification of his opinions, or continued the hearing to allow Berg to obtain further evidence. (*Id.*) He argues further, "If an ALJ finds that evidence submitted by a treating

physician is inadequate[,] the regulations place an affirmative duty on him to seek clarification or elaboration." (*Id.*, p. 14, citing 20 C.F.R. § 404.1512(e)(1); *Gossett v. Chater*, 947 F. Supp. 1272, 1279 (S.D. Ind. 1996))

The Commissioner agrees the ALJ had a duty to develop the record fully and fairly, but argues any error was harmless. She notes the records of Berg's allergy testing at the Mayo Clinic in the 1970s would have little probative value for the period at issue here, which begins in 1999. She further argues Berg or his attorney "certainly could have obtained and submitted those records by now, if they existed." (Doc. No. 9, p. 12) The Commissioner states it is a claimant's responsibility, and not the ALJ's, to provide medical evidence of disability. (*Id.*, n.3)

As noted above in this opinion, Berg had the duty to provide evidence from which the ALJ could make a finding as to his RFC, but the ALJ had a duty to assist Berg in obtaining evidence and to develop the record fully. *See Heckler v. Campbell*, 461 U.S. 458, 471 & n.1, 103 S. Ct. 1952, 1959 & n.1, 76 L. Ed. 2d 66 (1983) (Brennan, J., concurring) (ALJ's "duty of inquiry . . . rises to a 'special duty . . . to scrupulously and conscientiously explore for all relevant facts' . . .," citing *Broz v. Schweiker*, 677 F.2d 1351, 1364 (11th Cir. 1982), and decision maker should "inform himself about facts relevant to his decision and . . . learn the claimant's own version of those facts."); *Battles v. Shalala*, 36 F.3d 43, 44 (8th Cir. 1994) (ALJ has duty to develop record fully and fairly even when claimant is represented by counsel); *Cox v. Apfel*, 160 F.3d 1203, 1209 (8th Cir. 1998); *Bishop v. Sullivan*, 900 F.2d 1259, 1262 (8th Cir. 1990); *Johnson v. Callahan*, 968 F. Supp. 449, 458 (N.D. Iowa 1997); *Barry v. Shalala*, 885 F. Supp. 1224, 1241-42 (N.D. Iowa 1995). The Eighth Circuit expounded upon this duty in *Battles*, noting it is the Secretary's

> "'duty to develop the record fully and fairly, even if . . . the claimant is represented by counsel.'" *Boyd v. Sullivan*, 960 F.2d 733, 736 (8th Cir. 1992) (quoting *Warner v. Heckler*, 722 F.2d 428, 431 (8th Cir. 1983)). This is so because an administrative hearing is not an adversarial proceeding. *Henrie v. Dept. of Health & Human Serv.*, 13 F.3d 359, 361 (10th Cir. 1993). "[T]he goals of the Secretary and the advocates should be the same: that deserving claimants who apply for benefits receive justice." *Sears v. Bowen*, 840 F.2d 394, 402 (7th Cir. 1988). Moreover, "[a]n adequate hearing is indispensable because a reviewing court may consider only the Secretary's final decision [and] the evidence in the administrative transcript on which the decision was based." *Higbee v. Sullivan*, 975 F.2d 558, 562 (9th Cir. 1992) (per curiam).

Battles, 36 F.3d at 44. However, as the court noted in *Onstad v. Shalala*, 999 F.2d 1232 (8th Cir. 1993):

> While the ALJ has a duty to develop the record fully and fairly, *Driggins v. Harris*, 657 F.2d 187, 188 (8th Cir. 1981), even when a claimant has a lawyer, it is of some relevance to us that the lawyer did not obtain (or, so far as we know, try to obtain) the items that are now being complained about.

Onstad, 999 F.2d at 1234.

In considering an argument that an ALJ has failed to develop the record fully, the relevant inquiry is whether the claimant "was prejudiced or treated unfairly by how the ALJ did or did not develop the record; absent unfairness or prejudice, [the court] will not remand." *Id.* (citing *Phelan v. Bowen*, 846 F.2d 478, 481 (8th Cir. 1988)). *See Highfill v. Bowen*, 832 F.2d 112, 115 (8th Cir. 1987) (claimant must show prejudice or unfairness resulting from an incomplete record); *accord Anderson v. Chater*, 73 F.3d 366 (table), 1995 W.L. 763052 at *2 (8th Cir. 1995); *Scott v. Apfel*, 89 F. Supp. 2d 1066, 1076 (N.D.

Iowa 2000) (Bennett, C.J.) ("[T]he question is whether medical evidence already in the record provides a sufficient basis for a decision in favor of the Commissioner.").

Despite the Commissioner's argument to the contrary, the ALJ's failure to obtain the records from Berg's allergy testing at the Mayo Clinic in the 1970s prejudiced Berg somewhat on these facts. The ALJ relied on the lack of record evidence regarding Berg's allergies in finding Berg's testimony was not credible. The ALJ elaborated on the fact that although Berg claimed he had so many allergies the Mayo Clinic doctors "just gave up" trying to test him, there was no record of such testing in the three-page report from the Mayo Clinic. (*See* R. 27-28) Particularly in this case, where Berg was represented by a non-attorney whose qualifications appear nowhere in the record, the ALJ should have made either an attempt to obtain the records or a specific request to Berg to produce them before relying on their absence in his credibility assessment. The Commissioner argues Berg's attorney could or should have obtained the records and submitted them for consideration. However, it appears Berg only retained counsel after the Appeals Council issued its decision declining review after Berg's second hearing. The court gives no weight to counsel's failure to obtain the records at that stage of the proceedings.

Berg argues the ALJ erred in failing to develop the record further on whether his nonexertional limitations preclude him from working. Berg claims "the ALJ also had to discredit the treating physician's opinion that the environmental restrictions precluded employment." (Doc. No. 8, p. 13, citing R. 225) Dr. Carlson found Berg should "avoid work environments which contain dust and fumes as these would exacerbate his asthma and his allergies" (R. 225); however, the doctor did not state these limitations would preclude Berg from working. The consulting medical expert, Dr. Cromer, reviewed Dr. Carlson's statement, but found it "too vague to compare with the RFC restrictions." (R. 170) Nevertheless, the ALJ included in Berg's RFC the restriction that Berg "should avoid even

moderate exposure to extreme of cold, fumes, odors, dusts, gases, and poor ventilation." (R. 31) The ALJ's RFC determination does not contradict Dr. Carlson's opinion, and the court finds the ALJ did not err in failing "to discredit" the doctor's opinion.

Berg requests remand to allow the ALJ to obtain the Mayo Clinic records "to see whether the claimant's allegations concerning reactions to environmental irritants lacks credibility." (Doc. No. 8, p. 14) The court finds this action is unnecessary. Although the court has found the ALJ erred in relying on the absence of the records in evaluating Berg's credibility (the effect of which will be discussed in the next section of this opinion), the ALJ nevertheless included appropriate restrictions in his RFC assessment.

B. Credibility Determination

Berg argues the ALJ erred in discounting his credibility because he had failed to "seek frequent medical intervention," and he controls his symptoms "with medications routinely prescribed" for asthma. (Doc. No. 8, p. 15, quoting R. 28) He claims the ALJ penalized him "for having good knowledge of what will trigger an asthma attack and dealing with his disability." He argues further:

> The Social Security Act does not require the claimant to simply ignore his medical condition, place himself into a situation where he will become ill and seek medical attention, simply to become eligible for benefits.
>
> What is important is that the claimant sought medical attention – a long time ago – learned what he had to do to avoid medical problems, and followed the advice of his doctors. The result can clearly be seen by the photographs he provided to the Administration. P. 158. His house is devoid of carpet, curtains, upholstered furniture, or anything else that might trigger an asthma attack. His furniture is made out of wood. P. 431. He lives like a hermit in his own home, not

> allowing people to stay over night with him, and rarely visiting others. P. 431. He has learned that if he is working outside that he wears a mask. P. 375, 437. He has to wear a mask in the winter time. P. 388. He knows that at Christmas time he has to avoid any stores with poinsettias. P. 375, 434. He has had to curtail his involvement with service clubs due to the fact that more people show up wearing perfume. P. 434. His involvement with his church is much less, despite extreme efforts by his church to install air purifiers. P. 376, 384-385, 394.
>
> The fact that the claimant does not go to the doctor when he is having an asthma attack does not mean that he does not have listing level attacks. The claimant attempted to explain this during his first hearing. P. 372. He tells the judge that his asthmatic condition does not require the attention of an emergency room. He has to be able to deal with it – immediately – or die. Because of that, he carries the proper medication – as prescribed by his doctors for over thirty years – in his pocket. P. 372. If he were in a spasm there is not time to go to the emergency room. P. 372. As such, there are not emergency room visits in the medical records. The lack of records does not mean that there are not problems. It simply means that the claimant has learned to deal with his medical condition. Clearly, as indicated by the pharmacy records – he regularly takes life-giving medications. P. 107, 152-3, 225-260. A regimen for treatment is a valid factor that the ALJ should consider in making a credibility determination. *Mandziej v. Chater*, 944 F. Supp. 121, 133 (D.N.H. 1996). The ALJ makes no mention of the rigorous interventions that the claimant uses daily to try and circumvent asthma attacks.

(Doc. No. 8, p. 15-16; citations to "P." refer to pages in the Record)

The Commissioner argues the ALJ properly considered the *Polaski* factors in discounting Berg's credibility, noting his "physicians did not suggest he was disabled," and he "maintained an active lifestyle that was not consistent with [his] claims that he was

virtually homebound, so as to avoid all contact with airborne contaminants." (Doc. No. 9, p. 9) The Commissioner argues:

> [I]f Plaintiff's limitations were so profound as he alleges, one would expect Plaintiff's physicians to impose stricter limits on him than they did. Importantly, Plaintiff's treating physician's assessment, by Dr. Carlson, was that Plaintiff would remain healthy as long as he avoided only "dust and fumes" (Tr. 225). . . . Notably, neither Dr. Carlson's residual functional capacity assessment, nor his medical records, suggest that Plaintiff was as fragile as he currently claims.
>
> While occasionally documenting exacerbations of his asthma, all of Plaintiff's other medical records portray Plaintiff's asthma []as controlled with medication, and none of them suggested that Plaintiff would be confined to his home for most of the day. In 1997l, Dr. Elshami opined that Plaintiff's asthma was well-controlled with medication (Tr. 215). In January 2001, Plaintiff was noted to have "fair to good" control of his asthma (Tr. 335). In February 2001, a physician's assistant noted that Plaintiff should avoid tasks that exacerbate asthma, such as farming and real estate[] due to "omnipresent irritants and allergens," but made no mention of Plaintiff's ability to handle cleaner tasks (Tr. 157). The ALJ acknowledged that Plaintiff had an uncontrolled flare of symptoms in 2001, but properly pointed out that Plaintiff did not appear to be confined to his home even then (Tr. 28). Indeed, no treating physician ever indicated that Plaintiff was unable to work for any 12-month period within the time encompassed by his alleged disability.

(*Id.*, p. 10)

The Commissioner further argues Berg's "activities are inconsistent with [his] claim he could not tolerate even the slightest airborne contaminant." (*Id.*) She points out that Berg visited his mother-in-law in June 1999, and told his doctor he was concerned because his mother-in-law had several dogs and cats. In contrast, he testified he was unable to visit

any home with pets. (R. 430) Berg claims he can only leave his home for a few hours at a time, but testified he traveled to California by car, which the Commissioner notes "would presumably expose him to unpredictable pollutants outdoors, in strange hotel rooms, and in restaurants." (Doc. No. 9, p. 11) Berg claims he cannot tolerate smells such as perfume, but testified he eats out once a day where, according to the Commissioner, "he would have little control over the types of perfumes and other airborne contaminants [to which] he was exposed." (*Id.*) The Commissioner further states:

> Plaintiff also admitted that he was the member of several councils, that sometimes even held "incidental" meetings to discuss business plans (Tr. 435). Plaintiff said he jet skied several times per week, and that he handled the mowing and raking of his yard with a face mask (Tr. 436-38). Plaintiff also cared for his mother, and cared for his own home, including performing cooking, vacuuming, laundry, and grocery shopping (Tr. 434).
>
> Therefore, while it is obvious that Plaintiff has had to undertake measures to accommodate his asthma, there is little indication that he is as restricted as he claims. Plaintiff's admitted activities and trips are inconsistent with the claimed hair-trigger nature of his impairment. With reasonable precautions, Plaintiff was able to travel to strange places, perform yard work, exercise, eat in restaurants, tolerate pets, and perform other chores that would be impossible if he were fully credible as to his impairments.

(*Id.*)

Berg responds that he "is not a blob, who because of his ailment, is going to let it control his life." (Doc. No. 10, p. 1) He does not claim he is unable to do anything at all, but that his ailment prevents him from performing substantial gainful activity by working forty hours per week. (*Id.*, p. 2) Berg points out that several unbiased witnesses testified to his breathing difficulties when he is confronted with dust and ordinary odors

such as newspaper ink, perfumes, and air fresheners. In addition, Berg notes his trip to visit his mother-in-law was prior to his claimed period of disability. He argues his asthma has worsened progressively since that time, and he, in effect, has created a "bubble" within which he maintains a controlled environment and spends most of his time. He can venture outside of his "bubble" for limited periods of time by taking large doses of his anti-asthmatic medications, but doing so repeatedly causes side effects that prevent him from functioning. (*See* Doc. No. 10, pp. 5-7)

The parties' arguments, summarized above, illustrate the dilemma the ALJ faced in evaluating the credibility of Berg's subjective complaints. The Commissioner properly identified the primary issue in this case; that is, whether Berg's subjective complaints regarding the level, severity, and frequency of his symptoms are credible. If they are, then the VE testified he would be unable to maintain substantial gainful employment due to the inability to control environmental factors. If they are not, then Berg's level of daily activity, background and experience, and transferable skills indicate he would be able to work in a number of clerical capacities.

The problem with the ALJ's evaluation is the ALJ relied not on substantial evidence in the record, but on the absence from the record of certain evidence which, if required, the ALJ should have requested. The Commissioner points to the absence of records from the Mayo Clinic regarding Berg's allergy testing; the failure of a physician's assistant to make a notation about Berg's ability or inability to handle environments cleaner than those present in farming and real estate activities; and the absence of any doctor's indication that Berg could not work for any twelve-month period since his alleged onset date. As noted previously, the court finds the ALJ should have requested the Mayo Clinic records before relying on their absence in making his credibility determination. Regarding the absence of doctors' indications regarding Berg's disability status, the court notes those questions

were never asked of Berg's treating medical sources. Rather than relying on substantial record evidence to evaluate Berg's credibility, the ALJ relied on the absence of substantial evidence to support a contrary finding.

Based on the substantial evidence that is present in the record, the court finds Berg's subjective allegations regarding his limitations to be credible. His description of his limitations is uncontradicted by the evidence of record. His long-term treating physician stated he should completely avoid exposure to work environments containing dust and fumes. Consulting physician Dr. Cromer agreed, and specifically found Berg's subjective statements to be credible and consistent with the record evidence. Berg also had several individuals testify on his behalf in the first hearing to support his claims that he is unable to be around environmental irritants.

In addition, the ALJ's assessment of Berg's RFC includes the following restriction: "from an environmental standpoint [Berg] should avoid even moderate exposure to extremes of cold, fumes, odors, dusts, gases, and poor ventilation." (R. 31) Unless Berg worked in a sterile environment, it is difficult to imagine how this limitation could be accommodated by an employer.

From the perspective of one attempting to assess the degree of Berg's impairment, the most difficult aspect of this case is Berg's continued ability to participate in numerous community and nonprofit interests, travel and visit with friends and family, care for all of his personal needs, go shopping, ride his jet ski, live from day to day with little or no exertional or psychological symptoms, and manage his asthma without frequent exacerbations, hospitalization, or acute episodes requiring treatment. Because of the extremely serious physical and/or mental limitations afflicting the majority of Social Security appellants, a case of this nature involving allergies and asthma that do not require frequent hospitalization or life-threatening exacerbations is, by its nature, difficult to evaluate.

However, the record evidence supports a conclusion that Berg has been honest and forthright in his explanation of the problems he experiences due to his asthma. Ample medical records document the course of his treatment over the past thirteen years, and verify the chronic nature of his condition.

The court finds the record does not contain substantial evidence to support the ALJ's determination that Berg's subjective complaints are less than credible. In fact, the record contains substantial evidence to support the opposite conclusion. Having so found, Berg must be found to be disabled pursuant to the VE's opinion, and the opinions of the medical experts. His disability arises from the fact that although he has the physical and mental abilities and work experience to perform a wide variety of jobs, he would be unable to control the introduction of irritants into the work environment to an extent that would allow him to work ongoingly in a full-time job.

C. Adequacy of Hypothetical Questions

In his brief, Berg recites a history of physical problems in addition to his asthma, evidence of which exists in the record. These include gastrointestinal problems, hypertension, shoulder problems, psoriasis of his hands, and foot problems. (Doc. No. 8, 4-6) He complains that the ALJ said little or nothing about these issues, and did not discuss Berg's "limitations with walking both from the asthma, his hypertension, and his feet." (*Id.*, p. 19) He argues the limitations created by these impairments should have been included in a proper hypothetical to the VE. (*Id.*, pp. 19-20)

Berg has not cited any authority for the proposition that an ALJ is required to search the record for evidence of every medical difficulty ever suffered by a claimant, and then to include all of them in a hypothetical posed to the VE. The Eighth Circuit has held an ALJ's hypothetical question must fully describe the claimant's abilities and *impairments*

as evidenced in the record. *See Chamberlain v. Shalala*, 47 F.3d 1489, 1495 (8th Cir. 1995) (citing *Shelltrack v. Sullivan*, 938 F.2d 894, 898 (8th Cir. 1991)). A hypothetical question is "sufficient if it sets forth the impairments which are accepted as true by the ALJ." *Johnson v. Chater*, 108 F.3d 178, 180 (8th Cir. 1997); *House v. Shalala*, 34 F.3d 691, 694 (8th Cir. 1994). Only the impairments substantially supported by the record as a whole must be included in the ALJ's hypothetical. *Cruze v. Chater*, 85 F.3d 1320, 1323 (8th Cir. 1996) (citing *Stout v. Shalala*, 988 F.2d 853, 855 (8th Cir. 1993)).

The record does not contain evidence that Berg is impaired by these other medical problems, and indeed, he has not alleged disability on the basis of any physical impairment other than his asthma. The only mention he made in his testimony to these problems was that his shoulders bothers him after a long period of driving. The court finds no error in the ALJ's failure to include these difficulties in the hypothetical questions posed to the VE.

As far as Berg's limitations due to asthma, the first hypothetical question posed to the VE included "the degree of intolerance to environmental irritants described by Mr. Berg in his testimony." (R. 448) Based on those factors, the VE opined Berg would be unable to return to his past relevant work, or to perform any other type of work on a full-time basis. (*Id.*) The court finds no error in the hypothetical questions posed to the VE by the ALJ.

V. CONCLUSION

The court may affirm, modify or reverse the Commissioner's decision with or without remand to the Commissioner for rehearing. 42 U.S.C. § 405(g). In this case, where the record itself "convincingly establishes disability and further hearings would merely delay receipt of benefits, an immediate order granting benefits without remand is appropriate." *Cline*, 939 F.2d at 569 (citing *Jefferey v. Secretary of H.H.S.*, 849 F.2d

1129, 1133 (8th Cir. 1988); *Beeler v. Bowen*, 833 F.2d 124, 127-28 (8th Cir. 1987)); *accord Thomas v. Apfel*, 22 F. Supp. 2d 996, 999 (S.D. Iowa 1998) (where claimant is unable to do any work in the national economy, remand to take additional evidence would only delay receipt of benefits to which claimant is entitled, warranting reversal with award of benefits). In this case, the court finds the ALJ's decision should be reversed, and this case should be remanded for calculation and award of benefits.

Therefore, for the reasons discussed above, **IT IS RESPECTFULLY RECOMMENDED**, unless any party files objections[5] to the Report and Recommendation in accordance with 28 U.S.C. § 636 (b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service of a copy of this Report and Recommendation, that the Commissioner's decision be reversed, and this case be remanded for calculation and award of benefits.[6]

IT IS SO ORDERED.

DATED this 4th day of May, 2004.

PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

[5]Objections must specify the parts of the report and recommendation to which objections are made. Objections must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. *See* Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).

[6]NOTE: If the district court overrules this recommendation and final judgment is entered for the plaintiff, the plaintiff's counsel must comply with the requirements of Local Rule 54.2(b) in connection with any application for attorney fees.